No. 84-1279

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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STATE OF DELAWARE,

*Petitioner,*

v.

ROBERT E. VAN ARSDALL,

*Respondent.*

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**On Writ Of Certiorari**
**To The Supreme Court of Delaware**

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## BRIEF FOR RESPONDENT

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PRICKETT, JONES, ELLIOTT
KRISTOL & SCHNEE
BY: JOHN WILLIAMS
26 The Green
Dover, Delaware 19901
(302) 674-3841

WILLIAM N. NICHOLAS
4 The Green
Dover, Delaware 19901
(302) 674-4480
*Counsel for Respondent*

November 13, 1985

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

## QUESTIONS PRESENTED

I. Is the Supreme Court of Delaware required under the Confrontation Clause to apply a harmless error rule to a total prohibition in limine of relevant bias cross-examination of a prosecution witness?

II. May the Supreme Court of Delaware as a matter of State law afford greater protections to its citizens who are erroneously deprived of the right of relevant bias cross-examination of a prosecution witness than required by federal law?

III. Is a criminal defendant, as contended by amicus curiae, required to demonstrate that an erroneous restriction of relevant bias cross-examination of a prosecution witness actually and materially prejudiced his defense?

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## JURSIDICTION

The Supreme Court of Delaware is not required under the Confrontation Clause of the Sixth Amendment to the United States Constitution to apply a harmless error rule to a total prohibition in limine of relevant bias cross-examination of a prosecution witness.[1] In the alternative only, Respondent Robert E. Van Arsdall[2] also asserts that there is no federal jurisdictional basis to review the November 19, 1984, decision of the Delaware Supreme Court[3] on certiorari and this writ of certiorari should be dismissed as improvidently granted. That is, if the Supreme Court of Delaware determines as a matter of State law to afford greater rights to its citizens who are attempting to pursue relevant bias cross-examination of a prosecution witness at a criminal trial than required by federal law, such state action is not Constitutionally impermissible.[4]

## CONSTITUTIONAL PROVISIONS

The Delaware Constitution of 1897, Article I, § 7 states in part:

> In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face. . . .

## STATEMENT OF THE CASE

### A. Trial Testimony of Fleetwood

The scene of this homicide was the second floor apartment of co-defendant Daniel Pregent.[5] When Van Arsdall visited the Pregent apartment earlier in the day on December 31, 1981,

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[1] See discussion hereafter in Argument I.

[2] Hereinafter sometimes referred to simply as "Van Arsdall

[3] *Van Arsdall* v. *State*, 486 A.2d 1 (Del. 1984).

[4] See discussion hereafter in Argument II.

[5] Direct examination of Robert E. Van Arsdall in trial transcript volume X at pages 41 through 58, as contained at pages 141-157 of the Joint Appendix, and hereinafter cited as "J.A. 141-157."

Pregent had shown him the rear entrance and said Van Arsdall could visit him by utilizing the back steps. J.A. 141-142. At approximately 11:30 p.m. on December 31, 1981, Van Arsdall returned to the Pregent apartment by this rear stairway.[6] J.A. 141-142.

Robert J. Fleetwood, the tenth of sixteen prosecution witnesses, testified that he left his apartment "around 11:00" and walked across the hall to the apartment of Pregent, his neighbor. J.A. 81-82. The door of the Pregent apartment was open, and Fleetwood claimed that he observed Van Arsdall sitting on the bed and Pregent's feet hanging from the bed. J.A. 82-83. Prosecution witness Fleetwood did not know if Doris Epps, the homicide victim, was present in the Pregent apartment. J.A. 82-85.

Van Arsdall never acknowledged observing or being observed by Fleetwood after his evening return to the Pregent apartment *prior* to the Epps homicide. From the time that Van Arsdall returned to the Pregent apartment at approximately 11:30 p.m. until the Epps homicide, Van Arsdall acknowledged being seen only by Pregent[7] and Doris Epps. J.A. 141-157.

During the prosecutor's cross-examination at trial, Van Arsdall stated that the last time he had seen Fleetwood prior to the homicide was during his second visit in the afternoon and before his evening return. J.A. 166-167. This defense assertion that Fleetwood was unaware of the presence of Van Arsdall in

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[6] In the opening statement by defense counsel at trial, the Kent County Superior Court jury was advised that Van Arsdall entered the Pregent residence " . . . through a back door of the apartment *unseen by anyone except Danny Pregent* who admitted him . . ." J.A. 64 (emphasis added).

[7] Pregent was a co-defendant of Van Arsdall also charged with the first degree murder of Epps. Pregent was tried separately and acquitted at a later proceeding. In his January 5, 1982 custodial statement, Pregent informed the police investigating the homicide that he did not think Van Arsdall had murdered Epps. J.A. 7-8. Apparently, Pregent's successful defense was that he slept through a knife murder in his own bed and he had no explanation for the blood on his pants. J.A. 5-6, 43, 53, and 56-57.



the Pregent apartment immediately prior to the homicide was contradicted by Fleetwood, who claimed to have seen Van Arsdall there at approximately 11:00 p.m. J.A. 81-83. This contradiction between the testimony of Fleetwood and Van Arsdall was highlighted by the prosecutor's provocative cross-examination of Van Arsdall. J.A. 166-168.

A defense presented at trial and asserted in closing argument by defense counsel was that the actions of Van Arsdall after the homicide were inconsistent with the conduct of a guilty party. J.A. 195-197. During closing argument, defense counsel stated to the jury:

> Robert Van Arsdall tells you he goes across the hall. Foolishly and for no reason, he picks up the knife. He says he did not want to leave it there for Danny Pregent, and he did not know what Pregent would do if he had another weapon. But he takes this knife, the murder weapon. He takes it across the hall. He does not flee. He does not run out the back door where he came in and where, apparently, no one, with the exception of Daniel Pregent, saw him there.
>
> No, he does not do that. He goes across the hall where he knows Robert Fleetwood lives, and he knocks on the door. Jane Meiner [sic] answers when he says who is there. He says, "Bobby." She thinks it is Bobby Crain. She opens the door, and he goes inside. He tells them he has been in a fight, and he surrenders the weapon. He is not keeping the weapon from anybody. He does not resist.
>
> The weapon is taken away from him, and he tells them that there is something wrong across the hall. He tells Mark Mood and Jane Meiner that.
>
> I submit to you is that the action of a murderer? Is he going to take the murder weapon? What can be more incriminating than to go carrying around the bloody murder weapon, take it across the hall, tell other people what has happened, and not run away?
>
> This murder did not happen in Bobby Van Arsdall's apartment. This was a body in the kitchen of Daniel Pregent. But what are the actions of Robert Van Arsdall? J.A. 195-196.

This defense explanation for the actions of Van Arsdall in taking the murder weapon and revealing his presence to the individuals in the neighboring apartment was undercut by the prosecution's use of Fleetwood's testimony in cross-examining Van Arsdall. J.A. 166-167. The defense assertion at trial was that the direct testimony of Fleetwood notwithstanding, Van Arsdall's presence in the Pregent apartment immediately prior to the homicide was unknown to any of the occupants of the Fleetwood apartment. J.A. 64, 196. This was stressed by defense counsel while addressing the jury both in opening statement (J.A. 64) and in closing argument. J.A. 196.

### B. Cross-Examination Of Van Arsdall

The significance of Fleetwood's trial testimony became apparent during the prosecutor's cross-examination of the defendant. J.A. 166-167. The prosecutor asked Van Arsdall a series of questions on cross-examination regarding why he took the murder weapon, a kitchen knife, across the hall to the apartment of Fleetwood. J.A. 166-167. First, Van Arsdall was asked by the prosecutor to confirm that he did take the knife across the hallway. J.A. 166. Second, the prosecutor asked Van Arsdall if he knew who was across the hall, and the defendant replied, "All I know, Fleetwood was across there." J.A. 166. Pursuing this cross-examination, the prosecutor next asked van Arsdall when he had last seen Fleetwood, and Van Arsdall replied that it was during his second visit to the Pregent apartment earlier that afternoon. J.A. 166. The prosecutor followed up by inquiring what Fleetwood was doing when Van Arsdall last saw him. J.A. 166-167. Continuing to pursue the matter, the prosecutor inquired: "That's all you thought was across the hall was Fleetwood?" J.A. 167. When Van Arsdall replied in the affirmative, the prosecutor asked the highly provocative question as to why Van Arsdall went over to the Fleetwood apartment after the homicide: "Are you sure you didn't go across the hall to kill him?" J.A. 167.

After Van Arsdall denied going to kill Fleetwood, the prosecutor asked a series of follow-up questions concerning how



Van Arsdall was holding the knife. J.A. 167-168. He asked if Van Arsdall was attempting to hide the murder weapon when he went to Fleetwood's apartment. J.A. 168. Finally, the prosecutor asked Van Arsdall why he had entered the Pregent apartment from the back door.[8] J.A. 168.

### C. Evidence Of Pregent's Guilt

There was substantial evidence that co-defendant Pregent committed the Epps homicide. Both legs of Pregent's pants had blood stains below the knee on front and back. J.A. 178. The prosecutor argued in closing that the wet undershirt and socks found in a trash can of Pregent's bathroom (J.A. 54) belonged to Pregent and contained the victim's pubic and body hairs. J.A. 172.

The State of Delaware clearly thought that Pregent was involved in the Epps homicide, since Pregent was tried and, ironically, acquitted, at a subsequent trial.[9] In both his opening and closing argument, the prosecutor contended that even if Van Arsdall did not stab Epps, he was an accomplice of Pregent. (Trial Transcript volume II, at page 20, hereafter cited as Tr. II-20, and XI-7-8). In fact, the State requested an accomplice jury charge in the Van Arsdall prosecution. *Van Arsdall* v. *State*, *supra*, 10.

#### 1. Pregent-Stevens Altercation

During the New Year's Eve party, there was an argument between Pregent and Ida Mae Stevens, another party guest. Prosecution witness Robert S. Crain described the argument between Pregent and Stevens, as follows: "Well, he wanted to

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[8] This line of cross-examination by the prosecutor of the defendant at trial clearly suggested that even if Van Arsdall did not admit seeing Fleetwood when the latter claimed he visited the Pregent apartment at "around 11:00," the jury should draw the inference that Van Arsdall crossed the hall to eliminate Fleetwood, a witness to his presence at the scene immediately prior to the murder.

[9] See footnote 7 at page 7 of Petitioner's Opening Brief.

fight, I believe he wanted to hit Ida Mae or something like that, and we had to sort of like hold him down and calm him down. He kicked a hole in the wall and everything." Tr. II-95. Alice Jane Meinier, another prosecution witness, also recalled that Pregent had to be restrained from fighting Ida Mae Stevens, and she witnessed Pregent kick a hole in the hallway wall while being so restrained. Tr. IV-54. Meinier described Pregent as being "wild" during the altercation with Stevens. Tr. IV-54. *See* J.A. 8-9. Meinier recollected that the incident involving Pregent and Stevens occurred sometime after 6:30 p.m. on December 31. Tr. IV-11, 55. Subsequently, both Fleetwood and Meinier left Fleetwood's apartment when Fleetwood went to get beer and Meinier used Pregent's bathroom. Tr. IV-55.

**2. Scuffle In Fleetwood Apartment**

When Fleetwood and Meinier left Fleetwood's apartment, Pregent became involved "in some sort of a scuffle" in Fleetwood's apartment, and glasses, ashtrays, and a table were broken. Tr. IV-55-56. After Fleetwood returned from the liquor store, he found his apartment messed up and he made everyone leave except Meinier and Mark Mood. J.A. 80-81. Although Fleetwood claims that he left again around 11:00 p.m. to go across the hall to Pregent's residence (J.A. 82), Meinier testified that Fleetwood did not leave after returning from the liquor store. J.A. 138-139.

**3. Arrest Of Pregent**

Bruce Timmons of the Smyrna Police Department was the first policeman to enter Pregent's apartment. Tr. V-7. After confirming that the victim was dead in the kitchen, Timmons entered the unlit bedroom area, and with his flashlight noticed a subject lying on a sofabed wrapped in a blanket. Tr. V-8, IV-129. There was a large stain of what appeared to be blood next to and on the bed. Tr. IV-130. When Timmons pulled away the covers, the individual on the bed ". . . started to come up. He was then pushed back down on the bed and handcuffed . . . ." Tr. IV-130. In fact, Timmons testified that he needed



assistance in handcuffing Pregent. Tr. IV-130. Timmons, after arresting Pregent, took him into the hallway, where he noticed Corporal Howard Fortner with Van Arsdall and Meinier. Tr. IV-133. He observed that Van Arsdall had what appeared to be blood stains on his clothing. Tr. IV-133. Timmons advised Fortner that Van Arsdall had blood on his clothing and told Fortner to arrest Van Arsdall.[10] Tr. IV-134.

**D. Denial Of Confrontation**

The Constitutional error which was the basis for the reversal of Van Arsdall's convictions by the Delaware Supreme Court occurred during the cross-examination of Fleetwood.[11] J.A. 99-116. On direct examination, Fleetwood placed Van Arsdall in the Pregent apartment immediately prior to the Epps homicide. J.A. 81-85. Defense counsel attempted to cross-examine Fleetwood concerning his possible bias or interest in testifying on behalf of the State. J.A. 99-116

When defense counsel attempted to cross-examine Fleetwood concerning his August 6, 1982 arrest on a charge of being drunk on the highway,[12] the prosecutor objected. J.A. 100. He objected, first, that the inquiry as to the witness' bias was not relevant, and, second, that "any remote relevance" was outweighed by concerns of prejudice to the State and confusion of the issues. J.A. 107-108. After a lengthy voir dire examination

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[10] Defense contended the police made a hasty arrest at the scene of both Pregent and Van Arsdall within nineteen minutes after being notified. J.A. 63 and 200.

[11] Both the Petitioner and Amicus Curiae concede that the Confrontation Clause was violated by the trial judge's erroneous restriction on defense cross-examination as to interest or bias of a prosecution witness. Accordingly, this issue is not before the Court. *See United States* v. *Leon*, 486 U.S. ——, 82 L.Ed.2d 677 (1984), reh. den., 82 L.Ed.2d 942.

[12] Being drunk on the highway is a violation of DEL. CODE ANN. tit. 21 § 4149 (1979), conviction for which carries a possible prison sentence of up to thirty days for a first offense. DEL. CODE ANN. tit. 21 § 4205(a) (1979).

of the witness outside the presence of the jury and argument from counsel, the judge sustained the objection. J.A. 110.

### 1. Fleetwood's Deal

The purpose of attempting to cross-examine Fleetwood concerning his arrest on or about August 6, 1982 was to show his possible bias or interest in testifying favorably for the State. J.A. 100-116. When Fleetwood appeared in the Kent County Court of Common Pleas on August 31, 1982, he and his attorney were able to strike a deal with the Delaware Attorney General whereby his crimninal charge would be dropped in exchange for his appearing at the Attorney General's office to discuss his testimony in the Van Arsdall prosecution. J.A. 102-103. A notice of nolle prosequi stating that the charge against Fleetwood was dropped for "insufficient evidence" was filed by the prosecutor in the Van Arsdall case. J.A. 104. During his voir dire examination, Fleetwood outside the presence of the jury responded to the prosecutor's question as to his understanding of why his criminal charge was dropped, as follows: "Well, I did understand that I did feel that you wanted to make sure that I knew what I was talking about, and I do feel that you wanted to make sure I had my story together before coming in here. So that is why I did feel that it was dropped." J.A. 106.

In argument before the trial judge, defense counsel stated that the issue of interest or bias cross-examination was controlled by a 1979 decision of the Delaware Supreme Court known as *Wintjen* v. *State*, 398 A.2d 780 (Del. 1979).[13] J.A. 109. As a result of the trial judge's exclusion of the relevant bias cross-examination, defense counsel was prevented from showing the jury the factual basis for any potential bias or interest Fleetwood might have for testifying against Van Arsdall.[14] The importance of Fleetwood's trial testimony[15] was that he placed Van Arsdall at the Pregent apartment shortly *before* the Epps homicide (J.A. 81-85), and the use made by the prosecutor of Fleetwood's testimony in cross-examining Van Arsdall. J.A. 166-168. During his cross-examination of Van Arsdall, the prosecutor asked the defendent if he went across the hall to Fleetwood's apartment after the Epps homicide in order to kill Fleetwood. J.A. 167.

[13] The same Superior Court judge who presided in *Wintjen* presided over this prosecution of Van Arsdall.



During closing argument, defense counsel pointed out to the jury that the prosecution presented sixteen witnesses and introduced seventy-five exhibits during nine days of testimony in an attempt to establish its circumstantial evidence case against Van Arsdall.[16] Tr. XI-101-102. A major assertion by the defense in closing argument was that if Van Arsdall had

[14] The case against Van Arsdall was wholly circumstantial in nature, and no one, including Pregent, claimed to have witnessed Van Arsdall committing a murder. *Van Arsdall* v. *State*, *supra*, 5. J.A. 43. In fact, Pregent's January 5, 1982 custodial statement was that Pregent did not know who had killed Doris Epps, he did not think Van Arsdall had perpetrated the homicide, and his suspicion was that the murder was committed by "a jealous boyfriend." J.A. 6-8. In this respect, the facts in the case at bar are distinguishable from this Court's 1974 decision in *Davis* v. *Alaska*, 415 U.S. 308 (1974). In *Davis*, the conviction was reversed when defense counsel was prevented from cross-examining a prosecution witness as to his juvenile record. The distinction in *Davis* was that the unconfronted prosecution witness, Richard Green, was "crucial." *Id.*, 310. In a case, such as this, where all prosecution evidence is circumstantial in the sense that no witness can testify to having seen or heard the homicide, there is no witness who can be identified as "crucial." Any attempt to limit confrontation rights only to "crucial" prosecution witnesses is misguided and an illogical exercise in the wholly circumstantial evidence case.

[15] Meinier denied that Fleetwood left his apartment after returning from the liquor store. J.A. 138-139.

[16] Jury deliberations also extended over two days. *See Van Arsdall* v. *State*, *supra*, 5, for a discussion of the circumstantial nature of the State's case.

entered the Pregent apartment from the rear stairs *unobserved by anyone except Pregent*, why would Van Arsdall as a murderer or murder accomplice *reveal* himself by going across the hall with the bloody murder weapon and knocking on Fleetwood's apartment door. J.A. 196 and Tr. XI-109. Van Arsdall did not observe Fleetwood upon his return to the Pregent apartment, and Meinier denied that Fleetwood left his apartment at the time when Van Arsdall would have been present (J.A. 138-139); thus, under these circumstances, the highly provocative suggestion made by the prosecutor that Van Arsdall went across the hall after the Epps homicide to kill Fleetwood undercut Van Arsdall's explanation and defense. This homicide did not occur in Van Arsdall's residence, and the only other individual apart from Pregent who could place Van Arsdall at the scene prior to the murder was Fleetwood.

**2. The Blake Murder**

At trial defense counsel also wanted to cross-examine Fleetwood concerning the fact that he was a suspect of the Smyra Police Department in the August 21, 1982 murder of Anthony Blake.[17] J.A. 111. The purpose of the second proposed area of inquiry to demonstrate bias or interest of Fleetwood in testifying as a prosecution witness was the fact that Detective Bowers, who was also the chief investigating officer in the Epps

[17] The Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, 7 at fn. 3, stated that it was not necessary to determine whether the trial court had erred in preventing defense counsel from cross-examining Fleetwood about the Blake murder investigation, since the convictions were being reversed on the basis of the other confrontation violation, but the Delaware Supreme Court did ". . . note that the presumption in favor of cross-examination requires that an accused be given some latitude to search for agreements or understandings, even where no actual or communicated deal exists." Even if this Court determines that the Delaware Supreme Court was incorrect, this case must be remanded in order to permit the State appellate court to rule on the other confrontation denial regarding the Blake murder.



homicide, had picked up Fleetwood and taken him to Blake's funeral and in the presence of Blake's mourners and relatives questioned Fleetwood about Blake's murder shortly before the commencement of Van Arsdall's trial. J.A. 111-112. The purpose of this proposed defense cross-examination was to interrogate Fleetwood regarding whether he considered himself a suspect in the Blake murder investigation and if Fleetwood felt he was a suspect whether that affected his testimony for the State. J.A. 112.

Again, the prosecutor objected to this attempted bias or interest cross-examination of Fleetwood on the ground of relevance and the assertion that any possible relevance was outweighed by the danger of unfair prejudice to the State, confusion of the issues, or misleading of the jury. J.A. 112. As to the Blake homicide cross-examination, defense counsel again asserted to the trial judge that the defense was entitled to inquire into whether Fleetwood then considered himself to be a suspect in the Blake murder investigation in order that the jury could make an independent assessment of the witness' possible bias or interest. J.A. 114-115. Once more, the trial judge sustained the State's objection to the bias or interest cross-examination of Fleetwood concerning the Blake homicide ". . . on the entire line of questioning."[18] J.A. 115.

[18] Thus, the trial judge denied Van Arsdall the right to confront Fleetwood not only as to the fact that the prosecutor had recently dropped criminal charges against Fleetwood in another court, but Van Arsdall's jury was prevented from hearing the defense cross-examination of Fleetwood regarding the fact that Fleetwood was a suspect in the very recent murder of Anthony Blake. It is not implausible to think that a prosecution witness who is a suspect in another homicide will attempt to curry favor with the same police officer by rendering helpful prosecution testimony in a different homicide trial. The Van Arsdall jury in assessing the possible bias or interest of Fleetwood was entitled to hear both that as a result of a deal with the prosecution criminal charges had been dropped against Fleetwood and that Fleetwood was a suspect or at the time of trial considered himself to be in a second murder investigation being conducted by the Smyrna Police Department. Today, the Blake homicide in 1982 remains unsolved, and Mark Mood

## SUMMARY OF ARGUMENT

**I.** A defendant should be "acquitted or convicted on the basis of all of the evidence which exposes the truth." *United States* v. *Leon*, *supra*, 684 (1984). The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees a criminal defendant the opportunity to expose the bias of an important prosecution witness. The holding of the Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, requiring that a defendant have the threshold opportunity to expose some bias of an important prosecution witness prior to any permissible discretionary limitation on cross-examination is consistent with this Court's decision in *Davis* v. *Alaska*, *supra*. *Harrington* v. *California*, 395 U.S. 250 (1967) only establishes a minimum federal standard allowing an examination for harmlessness where the error complained of involves the erroneous admission of harmless testimony and does not require the Delaware Supreme Court to review the error in this case for harmlessness.

**II.** In reversing these convictions, the Delaware Supreme Court employed its State harmless error rule. Del. Super. Ct. Cr. R. 52 (a). There is no federal harmless error rule applicable to state courts other than the minimum standard enunciated in *Chapman* v. *California*, 386 U.S. 18 (1967), reh. den., 386 U.S. 987. Amicus Curiae is improperly attempting to federalize a harmless error rule applicable to State courts, but there is no such dual source of law apart from the minimum standard of *Chapman*. *See generally Michigan* v. *Long*, 463 U.S. 1032, 1040-1044 (1983). When the Delaware Supreme Court is utilizing its own State harmless error rule, it is free as a matter of State law to afford greater protections to its citizens than required by *Chapman*. *See generally Connecticut* v. *Johnson*, 460 U.S. 73, 81 and 91 (1983). Such State action by the Dela-

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(another occupant of Fleetwood's apartment on December 31, 1981), who had previously been arrested for the Blake homicide in Smyrna, Delaware was released from custody when a witness recanted his prior incriminating statement against Mood.



ware Supreme Court is not susceptible to any federal right of review on certiorari by the United States Supreme Court. *See Michigan* v. *Long*, *supra*, 1043-1044. Thus, this Court is without jurisdiction to determine if Delaware has fashioned an improper State harmless error rule, as long as the minimum protections of *Chapman* are assured.

**III.** The facts and circumstances of this case require a reversal of the jury verdicts even under the minimum federal harmless error standard of *Chapman* v. *California*, *supra*, 22, 24. Both the Petitioner and Amicus denigrate the significance of Fleetwood's testimony. Fleetwood did not merely reiterate facts conceded by defense. The contention of the defense was that someone who had just committed a murder would not voluntarily reveal his presence at the scene to other individuals otherwise unaware of his return to Pregent's apartment. The testimony of Fleetwood that he had observed Van Arsdall at the Pregent apartment around 11:00 p.m. placed in issue before the jury the question of whether Van Arsdall went to the Fleetwood apartment after the Epps homicide as an innocent act or as an attempt to eliminate a potential witness to his presence at the homicide scene. The prosecutor made skillful use of this issue by pointedly asking Van Arsdall during cross-examination if he had gone to the Fleetwood apartment to kill Fleetwood. Under such factual circumstances, it cannot be found beyond a reasonable doubt that the total in limine prohibition of relevant bias cross-examination of a prosecution witness did not contribute to the convictions. *Chapman* v. *California*, *supra*, 23-24.

**IV.** The contention of Amicus Curiae only that an appellant bears the burden of proof in establishing that a constitutional error was harmful in order to be entitled to a reversal is directly contrary to the formulation of the minimum federal harmless error rule in *Chapman* v. *California*, *supra*, 24. *Chapman* requires that the beneficiary of a constitutional error prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* The

beneficiary of the constitutional error in this case was the prosecution since the trial judge erroneously prohibited the criminal defendant from introducing evidence helpful to the accused.[19] Without citation of any precedent and without presentation of any sound policy justification, Amicus contends that the Delaware Supreme Court should have required Van Arsdall ". . . to demonstrate that the restriction actually and materially prejudiced his defense."[20] The position of Amicus stands *Chapman* v. *California supra*, on its head, with no justification except to make the task of a criminal defendant

[19] At issue is the wrongful exclusion by the trial judge at the request of the prosecution of evidence favorable to the defendant. Amicus at page 14 of their Brief in claiming that this action by prosecutor/trial judge is equatable to any attempt by defense counsel ". . . to sow technical errors at trial for the sole purpose of obtaining a reversal on appeal" is obviously barking up the wrong tree. If there is any "game" [Amicus Brief p. 14] being played in the criminal justice process, it is by the prosecutor/trial judge who misguidedly think that only the prosecution is permitted to present evidence at trial. This situation is to be contrasted to the case where the trial judge has improperly admitted evidence against an accused for a jury's consideration. *See Harrington* v. *California*, 395 U.S. 250 (1969) (improper admission of pre-trial statements of two co-defendants who did not testify, but whose statements implicated Harrington by placing him at the scene of the robbery); and *Motes* v. *United States*, 178 U.S. 458 (1900) (Improper admission of pre-trial statement of escaped co-conspirator unavailable for cross-examination at trial). The important distinction between improper exclusion of defense evidence and improper admission of prosecution evidence is that in the former situation the jury is never permitted to hear evidence that an accused constitutionally should have been permitted to present.

[20] See discussion at pp. 17 and 9 of Amicus Brief, particularly fn. 21 at p. 17 thereof. Confrontation Clause violations are in the same category of Constitutional error as *Chapman* v. *California*, *supra* (improper comment by prosecution on defendant's failure to testify), where the beneficiary of the constitutional error is rightfully required to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, and are readily distinguishable from cases alleging ineffective assistance of counsel, where an appellate court reviewing the matter may rightfully require the complaining defendant to point out how trial counsel was ineffective. *See, e.g., Strickland* v. *Washington*, ____ U.S. ____, 80 L.Ed.2d 674 (1984); and *United States* v. *Hasting*, 461 U.S. 499 (1983).



properly complaining of a constitutional deprivation and attempting to obtain a fair trial by means of appellate review more difficult.[21]

## ARGUMENT

### I. THE DELAWARE SUPREME COURT IS NOT REQUIRED UNDER THE CONFRONTATION CLAUSE TO APPLY A HARMLESS ERROR RULE TO A TOTAL PROHIBITION IN LIMINE OF RELEVANT BIAS CROSS-EXAMINATION OF A PROSECUTION WITNESS.

The rulings of this Court teach that a defendant should be "acquitted or convicted on the basis of all the evidence which exposes the truth." *United States* v. *Leon*, *supra*, 684 (1984) (quoting *Alderman* v. *United States*, 394 U.S. 165, 175 (1969), reh. den., 394 U.S. 934). The Confrontation Clause of the Sixth Amendment of the United States Constitution is designed to expose the truth and to "assure fairness in the adversary criminal process." *United States* v. *Cronic*, ____ U.S. ____, 80 L. Ed.2d 657, 666 (1984). The error found in this case by the Delaware Supreme Court is an error that prevented the exposure of truth. The defendant was denied the opportunity to expose the bias of a prosecution witness whose testimony was an important factor in his conviction. That error denied the defendant's right to be "acquitted or convicted on the basis of all the evidence which exposes the truth." *United States* v. *Leon*, *supra*.

[21] As contended by Amcus Curiae, prosecutors should not only be permitted to abridge the constitutional rights of a criminal defendant with impunity, but the prosecution should continue to enjoy such purloined advantage unless the victim of the constitutional deprivation can ". . . demonstrate that the restriction actually and materially prejudiced his defense." Brief of Amicus Curiae at p. 17. Put simply, the assertion is that not only may the prosecutor make deals with witnesses in exchange for their cooperation, but that a proecutor should be able to hide his conduct from the jury's scrutiny. Any public policy justification for such prosecutorial conduct is lacking.

The importance of Fleetwood's testimony must be emphasized from the outset. The Petitioner and Amicus Curiae (hereinafter Amicus) go to great lengths to persuade this Court that Fleetwood's testimony was wholly unimportant because Van Arsdall admitted that he was in co-defendant Pregent's apartment prior to the murder.[22] However, Van Arsdall never conceded in his statements to the police, in his testimony at trial or at any other time that he was seen in Pregent's apartment by Fleetwood, or anyone, other than co-defendant Pregent, prior to the crime. In opening remarks to the jury defense counsel emphasized that while it was admitted Van Arsdall was there he was "unseen by anyone except Danny Pregent who admitted him." J.A. 64-65. (Petitioner's Brief 8). The establishment of this fact was crucial to the defense. The thrust of Van Arsdall's defense was that had he participated in the murder, or committed it alone, he would have fled and would not have willingly revealed his presence at the scene to any third person. Therefore, the very act of his leaving the scene, crossing the hall and alerting others to the crime indicated his innocence. Although initially Fleetwood was used to place Van Arsdall at the scene prior to the murder, ultimately his testimony was of far greater value to the State. Given the nature of the defense, it became necessary for the State to offer the jury some reason, other than Van Arsdall's innocent explanation, for why he crossed the hall to Fleetwood's apartment. Of the sixteen prosecution witnesses who testified at trial, Feetwood *alone* provided any explanation for that fact favorable to the prosecution. The State's theory was simple and telling. Through Fleetwood's testimony it created the inference that Van Arsdall went to

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[22] Petitioner's argument that on summation at trial defense counsel argued that Fleetwood's testimony was irrelevant is either disingenuous or naive. Defense counsel had been precluded from making any record from which Fleetwood's bias could be argued to the jury. Consequently defense counsel was left to make the best of a bad situation wholly of the State's making. J.A. 186-189. It is outrageous that after having prevented Van Arsdall at trial from making any such record and arguing it to the jury the State should now point to that fact as supporting its case on appeal.



Fleetwood's apartment carrying the murder weapon in order to kill Fleetwood and thus eliminate the only witness to his presence in Pregent's apartment. Further, the theory went, his murderous intent was only thwarted when Van Arsdall realized that Fleetwood was not alone in his apartment. Thus, Fleetwood's testimony became crucial because it provided the *only* explanation the State ever offered for Van Arsdall's behavior in going across the hall consistent with his guilt.

This was a case constructed entirely of circumstantial evidence. Even after the presentation of all the evidence the State candidly admitted in summation that it was unsure of exactly what events occurred in Pregent's apartment and whether both of the defendants or only one acting alone had committed the crime. Tr. XI-8. There was no eyewitness testimony regarding the murder. Two persons could have committed the crime. While there was no issue that Van Arsdall was present in the apartment at the time the murder occurred, he testified, however, that Pregent alone killed the victim. Pregent did not testify at Van Arsdall's trial. Ultimately, then, the jury was required to exercise its judgment in deciding whether Van Arsdall's innocent explanation for crossing the hall was true, or whether the State's alternative theory, offered solely through the use of Fleetwood's testimony, pointed to his guilt. It should be noted that at trial the State did not argue that Fleetwood's bias should not be exposed because he was an unimportant witness. The Petitioner should not now be permitted to mislead this Court about the importance of his testimony.[23] Given the probative effect of Fleetwood's testimony and its importance to the State, the exposure of his possible bias was vital to the defense and guaranteed by Van Arsdall's right to confrontation.

Historically, this Court has held that the right to confrontation through cross-examination is a substantial right funda-

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[23] See Argument III hereafter.

mental to a fair trial.[24] In cross-examination the "partiality" of a witness is "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis* v. *Alaska*, *supra*, 316, quoting 3 A. J. Wigmore, *Evidence* § 940 at p. 775 (Chadbourn rev. 1970). Further, this Court has stated that "exposure of a witness' motivation in testifying is a proper and important function of the Constitutionally protected right of cross-examination." *Davis* v. *Alaska*, *supra*, 316-317. *See Greene* v. *McElroy*, *supra*, 496. Recognizing the importance of bias cross-examination, this Court only last year stated that under *Alford* v. *United States*, *supra*, "a trial court *must* allow some cross-examination of a witness to show bias" [emphasis added] and that *Davis* "holds that the Confrontation Clause requires a defendant to have some opportunity to show bias on the part of a prosecution witness." *United States* v. *Abel*, 469 U.S. ____, 83 L. Ed.2d 450, 456 (1984). Moreover, this Court has recently written that where the defendant has been deprived of an opportunity to expose a witness' bias *Davis* entitles the defen-

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[24] *Davis* v. *Alaska*, *supra*, 315-316 (essential purpose of confrontation to secure opportunity of cross-examination); *Smith* v. *Illinois*, 390 U.S. 129 (1968) (confrontation a fundamental right); *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966) (concession by respondent properly made that denial of cross-examination is constitutional error of the first magnitude); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965) (right to confrontation as fundamental and essential to fair trial as right to counsel); *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965) (trial by jury necessarily implies full judicial protection of right to confrontation); *Green* v. *McElroy*, 360 U.S. 474, 496-497 (1959) (right to confrontation and cross-examination immutable and zealously protected); *In re Oliver*, 333 U.S. 257, 273 (1948) (right to examine witnesses against defendant basic to our system of jurisprudence); *Alford* v. *United States*, 282 U.S. 687, 692 (1931) (right of cross-examination essential to a fair trial); *Kirby* v. *United States*, 174 U.S. 47, 55 (1899) (right to confrontation a fundamental guarantee to life and liberty); and *The Ottawa*, 70 U.S. (3 Wall.) 165, 167 (1866) (cross-examination a matter of right). *See also* 5 Wigmore on Evidence § 1347 (3d ed. 1940). The roots of this right to confrontation are ancient. *See The Bible* Acts 25:16 (rev. stand. ed. 1952), "I answered that it was not the custom of the Romans to give up anyone before the accused met the accusers face to face, and had opportunity to make his defense concerning the charge laid against him."



dant to a new trial without any "specific showing of prejudice." *United States* v. *Cronic*, *supra*, 668. In this case both the Petitioner and Amicus concede that Respondent's right to confrontation was violated. (Petitioner's Brief 17 and Amicus Brief 11). Nonetheless, they argue that under *Davis* reversal is only required if the witness whose bias was unexposed was "crucial" and that this Court's decisions in *Chapman* v. *California*, *supra;* and *Harrington* v. *California*, *supra;* and its progeny [*Schneble* v. *Florida*, 405 U.S. 427 (1972); *Brown* v. *United States*, 411 U.S. 223 (1973); and *Parker* v. *Randolph*, 442 U.S. 62 (1979)] always require harmless error analysis of an admitted confrontation violation regarding the prohibition of bias cross-examination of a non-crucial witness. In order to respond to this assertion and to expose its fallacy careful attention must be paid to what the Delaware Supreme Court did and did not decide in this case.

Despite the efforts of Petitioner and Amicus to broad-brush the decision of the Delaware Supreme Court and its implications, the holding is actually extremely narrow. It holds that under the factual circumstances of this case, in which the witness' bias was "an important issue before the [trial] court and the excluded evidence was central to that issue" and where the trial court imposed a blanket prohibition against exploring that bias, thus violating the defendant's right to confrontation, it would assess error by a per se standard instead of examining the actual prejudicial impact of the error. *Van Arsdall* v. *State*, *supra*, 7. In doing so, it relied upon its previous decision in *Weber* v. *State*, 457 A.2d 674 (Del. 1983).

In *Weber* the Delaware Supreme Court determined that while a trial court has wide discretion to restrict the scope of cross-examination (*Id.*, 681-682), "A certain threshold level of cross-examination is Constitutionally required, and the discretion of the trial judge may not be interposed to defeat it." *Id.*, 682. In ascertaining whether sufficient bias cross-examination was allowed the Court stated it would look to whether (1) the jury was permitted to hear sufficient facts for it to draw

inferences as to the witness' reliability, and (2) whether defense counsel was permitted to establish a record adequate to argue the witness' bias to the jury. *Id.*, 682. More simply stated, the Delaware Supreme Court, both in *Weber* and *Van Arsdall*, has ruled that consistent with the right of confrontation the defendant must be allowed *some* opportunity to expose a witness' bias before the trial court may properly exercise its discretion to limit the scope of cross-examination.[25] While employing a "per se error" test, a careful reading of *Van Arsdall* in light of *Weber* reveals that the apparent harshness of such a test is considerably mitigated both by the method of its application and by the several exceptions thereto.

First, of course, the test will only be employed if the record reveals a total and blanket prohibition of all bias cross-examination.

[25] Far from being unique to Delaware this rule is widely employed. *United States* v. *Abel*, *supra*, 456; *United States* v. *Garza*, 754 F.2d 1202, 1208 (5th Cir. 1985); *United States* v. *Tracy*, 675 F.2d 443, 451 (1st Cir. 1982); *Reed* v. *United States*, 452 A.2d 1173, 1177 (D.C. App. 1982); *United States* v. *Hawkins*, 661 F.2d 436, 444 (5th Cir. 1981); *Chipman* v. *Mercer*, 628 F.2d 528, 530 (9th Cir. 1980); *Springer* v. *United States*, 388 A.2d 846, 855 (D.C. App. 1978); *United States* v. *Bass*, 490 F.2d 846, 857-868 (5th Cir. 1974); and *Hyman* v. *United States*, 342 A.2d 43, 44 (D.C. App. 1975). Other cases applying a harmless error analysis explicitly state that a trial court's discretionary authority to limit cross-examination only applies after the defendant has been permitted as a matter of right sufficient cross-examination to satisfy the confrontation requirement. *State* v. *Parrillo*, 480 A.2d 1349, 1358-59 (R.I. 1984); *Ransy* v. *State*, 680 P.2d 596, 597 (Nev. 1984); and *Carrillo* v. *Perkins*, 723 F.2d 1165, 1168, 1172 (5th Cir. 1984). Other courts implicitly follow the rule in applying harmless error tests where the jury heard some testimony at trial from which it could infer the witness' bias even though cross-examination on that issue was restricted. *State* v. *Parrillo*, *supra*; *United States* v. *Gambler*, 662 F.2d 834, 840 (D.C. Cir. 1981); *Kines* v. *Butterworth*, 669 F.2d 6, 13-14 (1st Cir. 1981), cert. dism'd, 421 U.S. 1006; *Commonwealth* v. *Wilson*, 407 N.E.2d 1229, 1246 (Mass. 1980); *State* v. *Pierce*, 414 N.E.2d 1038, 1043 (Ohio 1980); *State* v. *Patterson*, 656 P.2d 438, 440 (Utah 1982); *Hoover* v. *State of Maryland*, 714 F.2d 301, 305 (4th Cir. 1983); and *Carrillo* v. *Perkins*, *supra*, 1168, 1172. In *United States* v. *Duhart*, 511 F.2d 7, 9 (6th Cir. 1975), cert. dism'd, 421 U.S. 1006, the defendant was otherwise able to cast doubt on the witness' testimony and otherwise impeach it.



tion. Second, reversal will only be required if there is a strong showing that prejudice is implied. This can be understood from the reliance in *Weber* on the analysis of the effect of the automatic reversal rule as found in *Chipman* v. *Mercer*, *supra*, 683. The reasoning there is as follows. Initially, of course, the bias of the witness is always relevant. *Davis* v. *Alaska*, *supra*, 316. If a defendant then proposes to expose a witness' bias no confrontation violation occurs unless the denied area of cross-examination is of considerable relevance. *Chipman* v. *Mercer*, *supra*. In turn, the degree of relevance bears a close relation to whether the denial of confrontation was prejudicial. *Id.* Thus, an implication or presumption of prejudice arises where the defendant has been prohibited from exposing, through cross-examination, the considerably relevant bias of a prosecution witness. As Amicus notes (Amicus Brief p. 10), there are certain kinds of error which raise a presumption of prejudice because in ultimate effect it is impossible for an appellate court "to determine the actual or probable impact of the error" and because a substantial trial right is involved. It would appear that this is precisely the concept applied by this Court in *Alford* v. *United States*, *supra*. There, even though the defendant could not state what facts he hoped to develop on cross-examination this Court found that he had the right to pursue cross-examination and that:

> The trial court cut off *in limine* all inquiry on a subject to which the defense as entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. *Id.*, 694

This same line of analysis was endorsed in *Smith* v. *Illinois*, *supra*, and applies fully to the case at bar. Nothing in *Alford* suggests that on appeal the defendant was obligated to prove that he was prejudiced by the trial court's prohibition against cross-examination. To the contrary, the defendant could not even state what benefit to his case he hoped cross-examination would gain, yet prejudice was presumed because the defendant was deprived of a "substantial right . . . essential to a fair

trial."[26] In the case at bar the defendant was in pursuit of bias and the record suggests the possibility of bias was real. J.A. 118. There can be no doubt that Fleetwood's bias was a subject on which Van Arsdall was "entitled to a reasonable cross-examination." *Alford* v. *United States*, *supra*, 694. Consequently, here, as in *Alford*, the source of prejudice to the defendant should be no mystery. It must be presumed.[27] It is clear that the Delaware Supreme Court had this reasoning in mind when it pointedly noted that the issue of Fleetwood's bias was an "important" issue and that the excluded evidence was "central" to that issue. *Van Arsdall* v. *State*, *supra*, 7. Consequently, under the circumstances presented here, "The automatic reversal rule is not . . . entirely divorced from considerations of prejudicial error in its ultimate operation, even if it is so in its bare statement." *Chipman* v. *Mercer*, *supra*. The truth of this observation is abundantly clear if we examine the numerous exceptions to the rule as stated by the Delaware Supreme Court.

*Van Arsdall* does not establish a rigid automatic reversal rule mechanistically applied to every confrontation violation. In fact, in the very same decision the Delaware Supreme Court ruled that on this record the defendant did not have any absolute right to elicit the address of another State's witness, Jane Meinier, since the trial court apparently concluded that the question was asked to harrass or humilitate the witness. *Van Arsdall* v. *State*, *supra*, 7-8. *But see Smith* v. *Illinois*, *supra*, 131. The decision also makes it clear that the Court would always analyze a restriction (as distinguished from a total

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[26] *See* R. Pondolfi, "Principles For Application of The Harmless Error Standard," 41 U. Chi. L. Rev. 616 (1972), for the proposition that under *Alford* and *Smith* v. *Illinois* (a post-*Chapman* case) the very requirement of a showing of prejudice would deny a substantial right essential to a fair trial.

[27] Even though *Alford* was a federal case decided before *Chapman*, the presumption of prejudice is still either required because of the holding in *Smith* v. *Illinois* or under the theory that no appellate court under circumstances where evidence favorable to the defendant is improperly excluded can possibly measure the prejudicial impact of the error on the jury.



prohibition) of cross-examination for harmlessness.[28] *Van Arsdall* v. *State*, *supra*, 7; *Weber* v. *State*, *supra*, 683; and *Wintjen* v. *State*, *supra*, 29. That is to say, where there is no total prohibition, but a mere restriction of cross-examination, the court will apply the harmless constitutional error test under *Chapman* v. *California*, *supra*.[29] Further, the Delaware Supreme Court would not apply a per se error test under circumstances such as appeared in *Harrington* v. *California*, *supra; Schneble* v. *Florida*, *supra; Brown* v. *United States*, *supra;* or *Parker* v. *Randolph*, *supra*.[30] Both *Van Arsdall* and

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[28] The distinction between a mere limitation or restriction on cross-examination and its total prohibition must be emphasized since Petitioner attempts to blur the differences into insignificance. (Petitioner's Brief pp. 19, 28). For example, Petitioner states that *Davis* does not stand for the proposition that reversal is required if cross-examination of a witness has "in some way been impaired." (Petitioner's Brief p. 28). Van Arsdall agrees. The Delaware Supreme Court holds only that a "blanket prohibition against exploring bias" requires reversal. *Van Arsdall* v. *State*, *supra*, 7. Does the petitioner mean to say that cross-examination on the issue of bias can ever be "effective" if the defendant is totally foreclosed in limine from asking the witness any questions that would expose his bias, or that a total prohibition is a mere "impairment" of cross-examination? This also has application to the argument of Amicus that the Sixth Amendment guarantee must be viewed in reference to severity of deprivation. Van Arsdall can scarcely imagine a more severe deprivation than the total prohibition of the right to expose a witness' bias. *Strickland* v. *Washington*, *supra* is totally inaposite. There the Court alters the traditional test under *Chapman* to require the defendant to show specific prejudice caused by the alleged ineffectiveness of counsel for a variety of countervailing public policy reasons that have no application to a case such as this where the violation is easy to identify and where the presumption of prejudice is so important to substantial trial rights and the maintenance of public confidence in the fair administration of justice.

[29] *See Baynum* v. *United States*, 480 A.2d 698, 707 (D.C. App. 1984), where the court applied a test identical to the one employed by the Delaware Supreme Court. There the D.C. Court, finding that there was no in limine prohibition on bias cross-examination and sufficient cross-examination allowed from which the jury could infer bias, applied a harmless error test. The same kind of analysis would be permissible under *Van Arsdall*.

[30] The meaning of these cases and their inapplicability to the issue here presented will be discussed at greater length below. It must be initially

*Weber* make it quite clear that the per se error test would even have no application if cross-examination *was* totally prohibited but the cross-examination was: (1) cumulative as to the credibility of the witness, *Weber* v. *State*, *supra*, 683; (2) repetitive or unduly harrassing, *Van Arsdall* v. *State*, *supra*, 8; (3) related to a topic of marginal relevance, *Weber* v. *State*, *supra*, 682; (4) without probative value to the trier of fact, *Weber* v. *State*, *supra*, 682; (5) likely to have an adverse effect on the orderly conduct of trial, *Weber* v. *State*, *supra*, 682; or (6) likely to present any danger to a witness, *Van Arsdall* v. *State*, *supra*, 7 (citing with approval *Springer* v. *United States*, *supra*, 854.). Under any or all these conditions the Delaware Supreme Court would not find reversal required even if there was a total prohibition on cross-examination. In addition, the Court points out that after the defendant has been permitted *some* showing of bias the trial court may properly exercise its broad discretion to limit the extent of any further cross-examination. *Weber* v. *State*, *supra*, 681. In so doing it should consider a number of factors, including: (1) whether testimony of the witness is crucial; (2) the logical relevance of impeachment evidence to bias; (3) danger of unfair prejudice, confusion of issues or undue delay; and (4) whether evidence of bias is cumulative. *Id.*, 681. In the first instance, the trial court is not permitted to exercise its discretion so as to deprive the defendant of his right to confrontation. Given the limited application and many exceptions to this "per se error" test, it is clear that the rule is neither mechanistic nor fails to take into account the

stated, however, that *Harrington* was extensively argued to the Delaware Supreme Court by the Petitioner. The Delaware Supreme Court was, thus, fully aware that *Harrington* may create a federal standard requiring harmless error analysis in the special circumstances there found, i.e., (1) erroneous admission of harmless evidence cumulative of the defendant's own confession or statement by a non-testifying but confessing co-defendant; and (2) other overwhelming non-tainted evidence, including but not limited to inculpatory evidence from the defendant's own mouth.



practical realities of trial.[31] Further, Van Arsdall believes this approach is consistent with that taken by this Court in *Davis* v. *Alaska*, *supra*.

It is, of course, evident that this Court could have applied a harmless constitutional error analysis to the facts presented in *Davis*, as that rule had been announced earlier in *Chapman* v. *California*, *supra*. Instead, it found that the denial of the defendant's right to expose the witness' bias constituted "Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."[32] *Id.*, 318 (quoting *Brookhart* v. *Janis*, *supra*, 3). Confronted by *Davis* and the preceding decisions of this Court regarding a denial of the right to cross-examination,[33] both Petitioner and Amicus are forced to make concessions of their own. The Petitioner concedes that it could never be harmless to render a defendant's ability to show the unreliability of a "key" witness ineffective (Petitioner's Brief p. 20). Amicus concedes it could never be harmless to deny a defendant any opportunity to examine any adverse witness and that it could never be harmless to deny a defendant the right to cross-examine a "crucial" adverse witness, but that harmless error analysis would be appropriate to the denial of the right to cross-examine a "minor" witness.[34]

[31] Indeed, the question arises whether this per se error test is any more "automatic" in its application that the rule announced for *Sandstrom* violations in *Connecticut* v. *Johnson*, *supra*. There, as here, the rule would appear automatically to require reversal under some, but not all, circumstances.

[32] The Petitioner notes that this language was quoted by the Court as a concession made in a party's brief (Petitioner's Brief p. 28, fn. 26), perhaps intending to suggest that because it originated in a brief that it is barren of meaning. Such a reading ignores the very next sentence in the opinion which states, "This concession is properly made." *Brookhart* v. *Janis*, *supra*, 3.

[33] *Smith* v. *Illinois*, *supra*; *Brookhart* v. *Janis*, *supra*; *Pointer* v. *Texas*, *supra*; and *Alford* v. *United States*, *supra*.

[34] These concessions may be dispositive of this case if the Court concludes, as it should, that Fleetwood was not a minor or unimportant witness, as both Petitioner and Amicus have already conceded that Van Arsdall's Sixth Amendment right of confrontation was violated by the trial court and now merely deny that Fleetwood's testimony was important.

(Amicus Brief 19, fn. 25) In focusing on the asserted "minor" or "cumulative" nature of Fleetwood's testimony and on the fact that in *Davis* this Court found the witness' testimony and the defendant's ability to impeach it important, they ignore the conceptual consequences of other language in *Davis*, as well as other salient factors that distinguish *Davis* from *Van Arsdall* and from *Harrington*.

In *Davis* there was no total prohbition on exposing the witness' bias through cross-examination. Although in *Davis* the defendant was to some extent able to show "whether" the witness was biased, he was only foreclosed from showing "why." *Davis* v. *Alaska*, *supra*, 318. Of course, Van Arsdall was totally foreclosed from even suggesting to the jury that Fleetwood had any bias. In fact, he was not even permitted to ask whether the charges against Fleetwood had been dropped, or any other question suggesting that Fleetwood was testifying as a result of a promise, deal or inducement. *See Wintjen* v. *State*, *supra*, 782. Secondly, in *Davis* there was at least a competing public policy interest to be considered in the trial court's decision to limit the opportunity to expose the witness' possible bias. In the case at bar the prosecutor objected on grounds of relevancy (J. A. 107). While the trial court apparently found the requested area of cross-examination relevant, it sustained the state's objection on the basis of D.R.E. 403.[35] Thus, here the reason for the trial court prohibiting all bias cross-examination would appear to be far less compelling, especially since the trial court was presumptively aware that in *Davis* this Court had ruled that the state's strong interest in protecting a juvenile must give way to the defendant's right to receive a fair trial. *Davis* v. *Alaska*, *supra*, 320. Fleetwood, of course, was not a juvenile and Van Arsdall can discern no important public policy interest in protecting the exposure of

[35] D.R.E. 403 is identical to F.R.E. 403. The basis of the court's ruling prohibiting the defendant from cross-examining Fleetwood on the issue of whether he then considered himself a suspect in a separate homicide investigation is less clear. J. A. 115.



his bias through cross-examination. Thus, in both instances this case presents a far more egregious record than that before the court in *Davis*. While Van Arsdall admits that *Davis* may not require automatic reversal for every denial of the right to expose a witness' bias through cross-examination (the Delaware Supreme Court itself has pointed out several exceptions which Van Arsdall believes this Court would also find compelling), Van Arsdall does assert that the reasoning used in *Davis*, if extended to this more serious deprivation of the right to confrontation, would equally require reversal. This is evident if we now consider certain distinctions between *Davis* and *Harrington*, upon which Petitioner so heavily relies.

Petitioner and Amicus assert that this case is analogous if not identical to *Harrington*. The argument is that in *Harrington*, *Schneble*, and *Brown*, this Court applied a harmless error analysis even though there was a violation of *Bruton* v. *United States*, 391 U.S. 123 (1968). In each of those cases the lack of opportunity to confront a confessing co-defendant was found to be harmless; while in the case at bar Van Arsdall was deprived of the opportunity to confront Fleetwood, so this error too must be harmless. This analogy has superficial appeal until a closer look is taken at the differences between *Harrington* and *Davis*.

The first distinction is that in *Harrington* this Court dealt with erroneously admitted evidence, while in *Davis* the erroneous exclusion of evidence was the basis for reversal. This distinction is crucial. Petitioner argues that *Motes* v. *United States*, *supra*, is a precursor to *Harrington* and stands for the proposition that a violation of the confrontation clause can be harmless. Indeed, *Motes*, although decided many years before recognition of a constitutional harmless error rule, is in line with *Harrington;* however, these cases must be seen for what they actually hold. Essentially, in *Motes*, this Court refused to reverse the conviction of a defendant who confessed his guilt at trial on the witness stand even though he was not permitted to confront a non-testifying witness whose statement implicating

him was erroneously admitted into evidence. The import of *Motes* and even *Harrington* and its progeny is found in *Alford* v. *United States*, *supra*, where the Court explains that the summary denial of the right to cross-examination is "distinguishable from the erroneous admission of harmless testimony." *Id. See Nailor* v. *Williams*, 75 U.S. (8 Wall.) 348 (1868). In each of the cases relied upon by the Petitioner what the Court actually confronted was a determination of the potential prejudicial impact of an erroneous admission of harmless testimony. In none of these cases, although confrontation was technically denied, was there any realistic showing that defendant would have exposed any bias on the part of the confessing co-defendant since in each of them the defendant admitted the truth of the confessing co-defendant's statement.[36] Thus, in none of these cases was the Court actually confronted with the realistic possibility that the defendant was truly unable to present his version of the case as a result of any erroneous exclusion of evidence. In such cases, where the defendant confesses his own guilt, or admits it on the witness stand, if the Sixth Amendment right to confrontation is implicated at all it is only in its most technical sense. This would admittedly also be the situation in the case at bar if Fleetwood's testimony were identical to Van Arsdall's in both content and probative effect. But, as has been demonstrated, this was not the case. In addition, *Harrington* and its progeny are much more narrowly drawn than the Petitioner would have it. In all of these cases, the Court was cognizant that the record consisted of other

[36] In *Harrington* one of the three confessing co-defendants took the stand and was cross-examined. The other two non-testifying co-defendants merely placed the defendant at the scene but without a gun, a fact which he himself admitted in his statement. Likewise in *Schneble* v. *Florida*, *supra*, *Brown* v. *United States*, *supra*, and *Parker* v. *Randolph*, *supra*, the Court dealt with erroneously admitted harmless testimony since in each case the defendant himself admitted either by confession or statement the truth of the non-testifying co-defendant's statement. Indeed, "the Constitutional right of cross-examination [cite omitted] has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence." *Parker* v. *Randolph*, *supra*, 73.



overwhelming non-tainted evidence which was not circumstantial in nature. All of the evidence against Van Arsdall was circumstantial in nature and none of it can be characterized as overwhelming. In *Harrington* v. *California*, *supra*, the court explicitly states:

> *The case against Harrington was not woven from circumstantial evidence.* It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed. *Id.*, 254 [emphasis added].

In cases dealing with erroneously admitted harmless testimony in which there is other non-circumstantial overwhelming non-tainted evidence against the defendant, this Court looks to the probable impact of the error on the minds of the jury. Thus, the distinction between *Davis* and those cases becomes more clear. In *Davis* the Court found that where evidence potentially favorable to the accused is improperly excluded and where, by implication, there is no admission of the truth of the testimony of the witness to be impeached by the defendant, he is entitled to present the excluded evidence of the witness' bias to the jury whether it would believe that evidence or not. In *Harrington* the jury was exposed to *all* the evidence, including the improperly admitted testimony, and, accordingly, this Court could determine in the context of all the other non-tainted evidence that the jury would have convicted on that evidence even without the tainted evidence.[37] But the obverse is true in

[37] Petitioner's analogy also breaks down with regard to the complained of evidence being "tainted." Unlike the erroneous admission of a non-testifying co-defendant's statement, Fleetwood's testimony was not "tainted" for it was not improperly admitted in the first place. He was a live witness, asserting no testimonial privilege and, but for the trial judge's erroneous ruling, subject to cross-examination. Thus, it is only the exclusion of the bias cross-examination which creates the taint in this case and not the admission of Fleetwood's direct testimony. Further, under *Bruton* the confessing co-defendant is constitutionally immune from cross-examination and the error committed results from the trial court allowing the statement or confession to be admitted into evidence in the first place, necessarily foreclosing cross-examination. In the case at bar the defendant could have presented his version of the case through bias cross-examination of Fleetwood had the trial court simply concluded that he had a right to do so.

the *Davis* situation. There the Court could not measure the prejudicial impact of the erroneous exclusion of evidence of the witness' bias and wrote:

> *We cannot speculate as to whether the jury, as sole judge of the credibility of a witness would have accepted this line of reasoning had counsel been permitted to present it.* But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of Petitioner's act." *Douglas* v. *Alabama*, 380 U.S. 415. *Davis* v. *Alaska*, *supra*. 317. [emphasis added]

It is no less true that the jury was entitled to know of Fleetwood's possible bias so that it could make an informed judgment as to his credibility in deciding whether to believe Van Arsdall's innocent explanation for crossing the hall and revealing his presence to others or the State's inculpatory explanation as provided through Fleetwood's testimony. In any case, this Court in *Davis* explicitly declined to speculate on what the probable impact on the minds of the jury would have been had they heard proper cross-examination on the issue of bias. Nor will it do, as Petitioner argues, to limit reversal for prohibition of bias cross-examination to "crucial" witnesses.

In the first place, neither an appellate court, nor a trial court, will always be able to determine how important a particular witness is to the prosecution's case. There are admittedly cases where an appellate court can point with ease to a "crucial" witness in the case. This is especially so if the case was not built on circumstantial evidence, or if there were a limited number of witnesses at trial. However, in other cases, such as the case at bar, it will be exceedingly difficult to identify any one witness as "key" or "crucial." The point here is that the defendant should have the right to expose the bias of any witness against him.[38] Thereafter, if it can be shown that there

[38] The better rule appears to be that a defendant is permitted to expose the bias of any witness and if the witness is "crucial" then the trial court should afford the defendant greater latitude to explore the witness' bias as a discretionary matter. *Springer* v. *United States*, *supra*; *United States* v. *Summers*, 598 F.2d 450, 460 (5th Cir. 1979); and *United States* v. *Barrantine*, 591 F.2d 1069 (5th Cir. 1979). But the defendant always should have the threshold right to show some bias. Under Petitioner's reasoning the defendant would only have the right to confront "star," "key," or "crucial" witnesses. Presumably, under Petitioner's reasoning, in a case built entirely on circumstantial evidence and where no witness could be so identified, the defendant could be denied the right of confrontation altogether, unless the defendant could point to some specific prejudice arising therefrom. If a defendant is only permitted to confront "crucial" witnesses, the constitutional guarantee of confrontation would have no objective meaning and would be reduced to a mere rule of appellate interpretation. It must be recognized that appellate courts throughout the country are not as alike as tiles on a kitchen floor. Obviously in a close case one appellate court may well identify a witness as "crucial" while another court could find the same witness relatively unimportant. Thus, the Petitioner urges a rule on this Court which would not result in uniformity of application. In addition, exposure to the jury of the fact that a witness may be testifying only in exchange for criminal charges being dropped against him may have a more ubiquitous impact on the verdict than hearing erroneously admitted evidence. For example, who is to say that if a jury concludes that one relatively unimportant state's witness is biased because of a deal concluded with the state that the jury would not view other more "crucial" state's witnesses somewhat more skeptically.



is reason to restrict the scope of cross-examination, the trial court may use its discretion to do so and an appellate court can then review that restriction for harmlessness.

Second, the nature of improperly excluded evidence deprives the appellate court from meaningfully measuring the extent of the error. R. Traynor, *The Riddle of Harmless Error* 68 (1970). It should, therefore, always require reversal unless the testimony sought to be impeached was cumulative both in *content* and *probative effect*, (*Id.*, 70), as was clearly not here the case.[39] Petitioner and Amicus suggest, however, that if

[39] Other commentators agree that the inherent inability of an appellate court to determine the potential impact upon the jury of certain particularized kinds of error, especially the wrongful exclusion of evidence favorable to the accused, should result in reversal. D. A. Winslow, "Harmful Use of Harmless Error in Criminal Cases," 64 Corn. L. Rev. 538, 558-559 (1979); and P. J. Mause, "Harmless Constitutional Error: The Implications of *Chapman* v. *California*," 53 Minn. L. Rev. 519 (1969).

reversal is required because the appellate court cannot evaluate the prejudicial impact of the error on the verdict than a waste of judicial resources would result. This is not true. As Chief Justice Traynor points out:

> If appellate judges forthrightly opened the way to a new trial whenever a judgment was contaminated by error, there would be a cleansing effect on the trial process. A sharp appellate watch would in the long run deter error at the outset, thereby lessening the need of appeal and retrials. *The Riddle of Harmless Error* 50.

If this Court disturbs the well settled rule that trial courts must permit *some* bias cross-examination it will only encourage appellate litigation. A belief by a trial court that it can totally prohibit bias cross-examination because it believes the witness unimportant (which in many cases it will not be able to accurately assess) will lead to a significant increase in appeals and retrials. On the other hand, if the trial court knows that it must allow some bias cross-examination before properly exercising its discretion to limit the scope of additional cross-examination, confrontation will necessarily be raised less frequently on appeal since it will more often be afforded at trial. Furthermore, the appellate courts would then have better records before them from which to determine the possible harmlessness of the error.

Confrontation is always a substantial right. There are, as has been discussed, circumstances under which a total prohibition of the right of cross-examination will not compel reversal. To say, however, that a total prohibition can always be viewed as potentially harmless invites trial courts and prosecutors to prohibit cross-examination and then leave the matter to the appellate courts to determine whether within the context of the whole record the prohibition was harmless. Likewise, to limit the right of confrontation to "crucial" witnesses would have the same result, since ultimately it would always be left up to the appelatee courts to determine whether the witness was in fact crucial. In many cases, of course, the trial court would



never be able to make such a determination.[40] Under the approach of the Delaware Supreme Court, however, and the logical extension of the *Davis* rationale to these facts, some record of the success, or lack thereof, of cross-examination would always be available to the appellate court. That is, if the defendant is given some opportunity to present his version of the case by presenting evidence of bias to the jury, the appellate court will always have a far better record from which to determine whether any further restriction on the scope of cross-examination affected the judgment. In addition, if this Court now announces that *some* bias cross-examination is required at trial there will be less chance that counsel would internationally create error.

Petitioner and Amicus suggest that if a total prohibition of bias cross-examination is not always examined for harmlessness there is a danger that the criminal process will become a "game" and that counsel will have some incentive to "sow technical errors at trial for the sole purpose of obtaining a reversal on appeal." (Amicus Brief p. 14) (Petitioner's Brief p. 22). It is preposterous to suggest that a defendant asserting his

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[40] For example, in the case at bar, Fleetwood appeared on the third of nine days it took the prosecution to present its case. At the time of his testimony he was the only state's witness who placed Van Arsdall on the scene prior to the crime. This would, indeed, make him a "crucial" witness if no one else in the case offered any testimony putting Van Arsdall at the scene. Should the trial court, therefore, assume at that point that no other state witness would place Van Arsdall on the scene and deem Fleetwood to be "crucial" and subject to bias cross-examination, or should the trial court conclude that some other subsequent witness would also place Van Arsdall there and make Fleetwood's testimony less than "crucial." Even assuming, on the basis of counsel's opening comments, the trial court concluded Van Arsdall would admit being on the scene, how could the trial court possibly have known what the ultimate probative effect of Fleetwood's testimony would be as used by the State to undercut Van Arsdall's defense. That use of Fleetwood's testimony did not occur until the State had rested its case and the defense had gone forward. Of course, then it was too late, even had the trial court now recognized the damage being done by the State, to allow exposure of Fleetwood's bias.

constitutional guarantee to confrontation by attempting to expose the potential bias of a prosecution witness is attempting to "sow error" in the record. Van Arsdall did not create the error in this record. The State, attempting to conceal its deal with its witness from the jury, did so. If this Court rules that a total prohibition of bias cross-examination can be examined for harmlessness, the prosecution will always have an incentive to object to the introduction of any evidence exposing the bias of any of its witnesses. Indeed, it can reasonably be anticipated that under such circumstances the prosecution would always do so. As evidence for this proposition, the Court need only look to the history of this issue in Delaware discussed in Argument II B.

If this Court now announces a rule attenuating a defendant's right to expose the bias of a prosecution witness can it be anticipated that the state will suddenly become more solicitous of a defendant's right to present his version of the case? Nor can we conclude that the appellate court will necessarily be eager to vindicate those rights absent any clear direction from this Court to do so.[41] While Petitioner and Amicus make a great

[41] Given this Court's recent emphasis on harmless error a serious question is now being raised as to whether lower appellate courts are merely paying lip service to the substantial rights of criminal litigants, while in practice using the harmless error test to affirm convictions even where substantial rights have been denied. *See* Francis A. Allen, "A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review," 70 Iowa L. Rev. 311, 329-334 (1985); and Thomas Y. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeals." 1982 Am. Bar. Found. Research J., 543, 602-606 (1982). The reliance by Petitioner and Amicus upon *Giglio* v. *United States*, 405 U.S. 150 (1972) in this regard is also worrisome. There the knowing failure by a prosecutor to correct perjured testimony requires a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Id.*, 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). This standard is far from being "functionally equivalent" to the *Chapman* harmless error test. (Amicus Brief p. 24, fn. 29). Lifted wholesale from a pre-*Chapman* decision, this more stringent test would require reversal if there were any reasonable *possibility* that the error contributed to the verdict, while nevertheless,



deal out of the fact that a defendant is entitled not to a perfect trial but to a fair one,[42] Van Arsdall believes that an appellate court in reviewing the admitted deprivation of a right as fundamental as that of confrontation should apply more than a "no harm, no foul" analysis as Petitioner and Amicus apparently suggest. This so-called "correct result" test of harmless error has been severely criticized. *The Riddle of Harmless Error* 18-22. One major difficulty with this kind of analysis is that it erodes public confidence in the administration of criminal justice as much as automatic reversal for mere technical error once did. As Chief Justice Traynor suggests, once we take the purely pragmatic path of tolerating as harmless the denial of substantial trial rights, no one will ever be able to enter a courtroom confident of a fair trial. *Id.*, 19. In the long run

recognizing that in particular circumstances, such error would not always require reversal. *Cf. Motes* v. *United States*, *supra*. Moreover, this Court analyzes prosecutorial failure to disclose exculpatory material under a different standard from that employed in *Davis* v. *Alaska*, *supra*, for prohibition of bias cross-examination. *See*, *United States* v. *Bagley*, 473 U.S. ——, 87 L. Ed.2d 481, 491 (1985). This Court sits to do justice, not "logic." Van Arsdall can conceive of few, if any, circumstances under which this Court would feel compelled by the dictates of "logic" alone to condone as harmless the prosecution's knowing use of perjured testimony.

[42] "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953). If, as Amicus maintains (Amicus Brief, p. 13), the purpose of trial is to determine the factual question of the defendant's guilt or innocence then that question may only be fairly answered by exposing the trier of fact to all of the evidence, including that which the defendant has to offer. It would appear that Amicus and Petitioner believe that a defendant has received a "fair" trial if he is convicted only on the basis of the evidence the State has to offer at trial, but excluding any evidence the defendant has to offer suggesting his innocence. For a jury to convict in ignorance of the defendant's version of the case not only fails to assure conviction following a fair trial, it does not even assure a "correct result." It is incredible that Petitioner and Amicus should assert that a defendant having been convicted only on the State's evidence received a "fair" trial and should thereafter be required to prove in an appellate court that he is only entitled to retrial if he can demonstrate that he was "prejudiced" by not being permitted to present his case to the jury.

"retrial is a small price to pay for ensuring the right to a fair trail." *Id.*, 22.

The right to confrontation is explicitly guaranteed by the United States Constitution in clear and concise language. Van Arsdall believes that while the right to confrontation may frequently be properly subject to judicial interpretation, that from the standpoint of maintaining public confidence in the fairness of the criminal process, all reasonable men of ordinary intelligence and experience would be shocked to learn that the confrontation clause does not guarantee a defendant the opportunity to reveal to the jury that a prosecution witness may be lying in order to curry favor with the state.

The Delaware rule, which is consistent with *Davis* v. *Alaska*, *supra*, is correct both theoretically and practically. It takes into account the interests both of the State and the defendant. The decision only requires the exposure of *some* bias cross-examination. After an appropriate objection by the State, the trial court would have its traditional wide discretion to limit the scope of cross-examination. Thereafter, if the defendant upon appeal asserted that his right to confrontation was denied the Court would assess any such error under the *Chapman* harmless constitutional error test. Initially, however the defendant would have been afforded his threshold right at trial to expose bias. Given the extremely narrow nature of this decision and the many exceptions mitigating against the harshness of the "per se error" test, together with the inherent reasonableness of the decision of the Delaware Supreme Court, this Court must affirm.



## II. THIS COURT HAS NO JURISDICTION UNDER FEDERAL CERTIORARI REVIEW TO REVERSE A DECISION OF THE DELAWARE SUPREME COURT EMPLOYING A STATE HARMLESS ERROR RULE WHICH AFFORDS GREATER RIGHTS TO DELAWARE STATE CITIZENS THAN PROVIDED BY THE FEDERAL HARMLESS ERROR RULE OF *CHAPMAN*.

### A. State Harmless Error Rule

Both the State of Delaware and Amicus concede that Van Arsdall's constitutional right to confront an adverse witness was denied by the trial judge's total in limine prohibition of interest or bias cross-examination. (Petitioner's Brief pp. 18-19, and Amicus Brief p. 11) Relying upon both the United States and Delaware Constitution provisions, the Delaware Supreme Court reversed the jury convictions. *Van Arsdall* v. *State*, *supra*, 6. U.S. CONST. amend, VI; and DEL. CONST. art. I, §7. Like all of the other fifty states, Delaware has a harmless error statute or rule. *Chapman* v. *California*, *supra*, 22; and Del. Super. Ct. Cr. R. 52(a). There is also a federal harmless error rule applicable to criminal proceedings in federal courts. F.R.Cr.P. 52(a); and 28 U.S.C. §2111. Nevertheless, the only "federal" harmless error rule applicable to state criminal proceedings is that of this Court in the 1967 opinion of *Chapman* v. *California*, *supra*.

As long as a state court affords the minimum protection of the federal harmless error rule of *Chapman* to a state criminal defendant who has been deprived of United States Constitutional rights, the state court has complied with any applicable federal protection that the beneficiary of a constitutional error prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Chapman* v. *California*, *supra*, 24. Beyond this minimum harmless error protection of *Chapman*, a state court as a matter purely of state law is permitted to afford its citizens greater protections than they might enjoy in a federal prosecution for violation of federal law.

*See Connecticut* v. *Johnson*, *supra*, 81-82, 88-89. *See also* discussion of federal/state dual source of law in *Michigan* v. *Long*, *supra*, 1040-1044.

The 1984 decision of the Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, has inherently as a matter of State law and under the particular circumstances of the case found that ". . . where the defendant was subject to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated." *Van Arsdall* v. *State*, *supra*, 7. There is no basis for federal certiorari review unless this decision was rendered as a matter of federal law. *Michigan* v. *Long*, *supra*, 1040-1044. To understand this decision as a product of the Court's inherent superintending function of its trial courts, an examination of prior Delaware confrontation decisions is necessary.

### B. Historical Development Of Delaware Rule

In 1979 the same Kent County Superior Court trial judge who presided in the first degree murder prosecution of Van Arsdall sat on the burglary/theft prosecution of Ray M. Wintjen. *Wintjen* v. *State*, *supra*. William Clark, identified in the Delaware Supreme Court Opinion as "the State's key witness," was an alleged accomplice of Wintjen who had given a written statement to the police at the time of his arrest. *Id.*, 782. When defense counsel attempted to cross-examine Clark as to whether a police officer suggested to him that he might be better off if he implicated Wintjen, the prosecutor objected and the judge without stating his reasoning sustained the objection. *Id.*

In reversing, *Wintjen* noted that bias is always relevant and there is no need to lay a foundation for bias cross-examination.[43] *Id.* Furthermore, this right to bias cross-examination

[43] Compare frivolous lack of foundation objection made by Van Arsdall prosecutor (J.A. 107) in the face of clearly controlling State precedent.



". . . is an essential element of the Constitutional right of confrontation." *Id. Wintjen* also stated, "In some cases, an improperly terminated cross-examination may be harmless error." *Id.* In noting that ". . . the jury heard little or no evidence about possible favorable treatment by the State," the Delaware Supreme Court relying upon *Chapman* could not ". . . say that the error was harmless beyond a reasonable doubt." *Wintjen* v. *State*, *supra*, 782. Finally, *Wintjen*, determined that the criminal defendant had not waived his right of confrontation ". . . by failing to pursue the State's objection with an offer of proof that Clark had, in fact, been offered special treatment.[44] *Id.*, 783.

Four years later, the Delaware Supreme Court was beset with a second egregious confrontation violation. In *Weber* v. *State*, *supra*, the trial court refused to permit the jury to hear that prosecution eyewitnesses to the alleged homicide had received cash payments from the victim's family prior to their testimony. The analysis of the confrontation violation in *Weber* is more extensive and complex than the earlier decision in *Wintjen*. *Weber* v. *State*, *supra*, 679-683. The 1983 *Weber* decision stated, "Clearly the question of bias was before the court, and the defendants had an absolute right to pursue it." *Weber* v. *State*, *supra*, 679-680. In finding it well settled that the bias of a prosecution witness is always relevant, *Weber* cited to both its prior decision in *Wintjen* v. *State*, *supra*, and *Davis* v. *Alaska*, *supra*, 316. *Weber* v. *State*, *supra*, 680.

A trial judge does not have absolute discretion in curtailing cross-examination of a witness for bias or interest; nevertheless, the trial judge in exercising his discretion may consider the logical relevance,[45] cumulative nature, and cruciality

[44] Detailed offers of proof were made at trial on Van Arsdall's behalf. J.A. 100-115.

[45] The trial judge in Van Arsdall denied the prosecutor's relevance objection, but sustained the objection under the Delaware State rule of evidence equivalent to F.R.E. 403. J.A. 107-110 and 112-115.

of the testimony, as well as the danger of unfair prejudice, confusion of issues, and undue delay. *Weber* v. *State*, *supra*, 681. Any possible right of discretionary curtailment by the trial judge was found absent in *Weber*, and the Delaware Supreme Court observed: ". . . it strains reason to perceive how cash payments made by the victim's family to a group of witnesses adverse to the defendants would not be a very proper subject of cross-examination at any time." *Id.* While noting that a trial judge has some discretion as to the scope of bias or interest cross-examination, *Weber* pointed out that, "A certain threshold level of cross-examination is constitutionally required. . . ." under both the United States and Delaware Constitutions. *Id.*, 682. *See*, *e.g.*, *Greene* v. *Wainright*, 634 F.2d 272 (5th Cir. 1981); and *Chipman* v. *Mercer*, *supra*.

*Weber* correctly noted that the focus in appellate review of confrontation violations ought to be on whether ". . . the jury was exposed to facts sufficient to draw inferences as to the reliability of the witness" and whether ". . . defense counsel had an adequate record from which to argue why the witness might have been biased." *Weber* v. *State*, *supra*, 682. *Weber* also pointed out that ". . . some topics will be of marginal relevance, and the trial court in such situations may properly prohibit cross-examination or allow only limited questioning." *Id.* The *Weber* Court cited *Davis* v. *Alaska*, *supra*, 317, as well as the United States and Delaware Constitutions. *Weber* v. *State*, *supra*, 683.

As here, the Delaware Attorney General in *Weber* argued to the Delaware Supreme Court that the trial judge's curtailment of confrontation was harmless error.[46] *Weber* v. *State*, *supra*, 683. In finding that the limitation on cross-examination was not harmless beyond a reasonable doubt, the Delaware Supreme Court in *Weber* said that, ". . . the standards used to determine

[46] The same plaintive contention of harmless error was made by the Delaware Attorney General in *Wintjen* and again before the Delaware Supreme Court in *Van Arsdall* v. *State*, *supra*, 7. Petitioner urges the same harmless error argument upon this Court.



if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless." *Id.*, 683.

### C. Superintending Authority Of Delaware Supreme Court

By 1984 it was obvious that in the exercise of its general authority to superintend the processes of its trial courts, the Delaware Supreme Court needed to resolve any possible question regarding the authority of trial judges in curtailing cross-examination of prosecution witnesses on the issue of bias or interest. Apparently, the message of the two reversals in *Wintjen* and *Weber* made no impression upon the trial judge in *Van Arsdall*, who, as noted, was the trial judge in *Wintjen*, even when defense counsel at trial twice attempted to point out the controlling authority of *Wintjen*. J.A. 109, 115. Under circumstances where a trial judge refuses to correct his past errors and there is a clear trial record (J.A. 109, 115), the Delaware Supreme Court has determined to send an unequivocal message to any still unmindful State trial judge.[47]

### D. The Delaware Rule

When met with such intransigence by a trial judge (J.A. 109, 115) as to the proper exercise of discretion in curtailing defense cross-examination on the issues of bias or interest, the Delaware Supreme Court in 1984 attempted to formulate a clear State rule for a current and continuing problem in its lower courts. *Van Arsdall* v. *State*, *supra*, 6-7. As in *Wintjen* and

[47] At page 32 of Petitioner's Brief it is inferentially contended that Van Arsdall's trial judge cannot be viewed as an instrument ". . . of the prosecution bent on subverting the defendant's ability to present a defense . . . ."; nevertheless, no other explanation is offered by Petitioner as to why Van Arsdall's trial judge when twice cited to prior controlling State authority (a reversal of his own earlier decision) (J.A. 109, 115) still assists the prosecutor in hiding the prosecutor's deal with witness Fleetwood from the jury in a first degree murder prosecution.

*Weber*, the Delaware Attorney General in the *Van Arsdall* appeal argued that any deprivation of the confrontation right was harmless error because the testimony of Fleetwood "was cumulative in nature and unimportant." *Van Arsdall* v. *State*, *supra*, 7.

In reviewing the 1983 formulation in *Weber* that "the standards used to determine if there is a violation of the confrontation clause in the first instance are similar, if not identical, to those used in deciding if the error was harmless," the Delaware Supreme Court observed that a 1982 decision of the District of Columbia Court of Appeals in *Reed* v. *United States*, 452 A.2d 1173, 1176-77 (D.C. App. 1982), stated a test *consistent* with *Davis* v. *Alaska*, *supra*, and the ruling in *Weber*. *Van Arsdall* v. *State*, *supra*, 7. The importance of this comparison is that the Delaware Supreme Court is not saying that its test in both *Weber* and *Van Arsdall* is *identical* with or compelled by *Davis* v. *Alaska*, *supra*, but that it is merely *consistent* with it. *Van Arsdall* v. *State*, *supra*, 7. In fact, in citing to another District of Columbia Court of Appeals decision, the Delaware Supreme Court in *Van Arsdall* announced that its holding was limited to the facts of the case at bar ". . . where the defendant was subjected to a blanket prohibition against exploring potential bias through cross-examination, the trial court committed a per se error. Consequently, the actual prejudicial impact of such an error is not examined and reversal is mandated." *Van Arsdall* v. *State*, *supra*, 7. *See also Webb* v. *United States*, 388 A.2d 857, 858 (D.C. App. 1978). By 1984, the Delaware Supreme Court had determined that it was necessary to fashion a State rule consistent, but not necessarily identical, with that of *Davis* v. *Alaska*, *supra*, to handle a continuing problem of how its State trial courts dealt with the right of a defendant to cross-examine prosecution witnesses as to interest or bias.

### 1. Consistency With *Chapman*

The State harmless error formulation for confrontation violations in *Van Arsdall* exceeds the minimum federal standard of *Chapman* v. *California*, *supra*. This grant of additional rights to Delaware citizens is permissible as a matter of Dela-



ware, rather than federal, law. *Connecticut* v. *Johnson*, *supra*, 81-82, 88-89. Federal Constitutional standards for the conduct of criminal trials set only *minimum* standards below which a state may not fall; however, a state is still free to require higher due process standards as a matter of state law. *Cf. Cooper* v. *California*, 386 U.S. 58, 62 (1967). Any "federal" minimum standard of harmless error for Constitutional violations is only relevant if a state court has first determined the error to be harmless.[48]

### 2. Distinguished From *Michigan* v. *Long*

The Delaware Supreme Court's selection of its own State harmless error rule distinguishes this matter from *Michigan* v. *Long*, *supra*. Here there is no dual source of law (state and federal) as was at issue in *Michigan* v. *Long*, *supra*, 1040-1044. Harmless error is inherently a state law question when a state criminal prosecution is at issue. *Connecticut* v. *Johnson*, *supra*, 88-89 (Stevens, J., concurring). *Van Arsdall* relied upon the State Constitutional provision, and as long as the minimum standard of *Chapman* is met, Delaware is free as a matter of State law to afford greater protections to its citizens. *Connecticut* v. *Johnson*, *supra*, 91-92 (Powell, J., dissenting).

The decision of the Delaware Supreme Court in *Van Arsdall* reflects an exercise of its inherent supervisory power to demarcate the scope of harmless error in accordance with Delaware's need to preserve fair trials in the lower courts under its supervision.[49] *Van Arsdall's* treatment of *total in limine* prohibition

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[48] For example, in both *Chapman* v. *California*, *supra*, and *Harrington* v. *California*, *supra*, the state court declared the Constitutional error to be "harmless." *See also* discussion in *Connecticut* v. *Johnson*, *supra*, 88-89 (Stevens, J., concurring), and 91-92 (Powell, J., dissenting).

[49] In fashioning such a State harmless error rule, the Delaware Supreme Court may also have been cognizant of the questions raised by some legal commentators that the harmless error type of analysis may be utilized as a tool to deny criminal defendants fundamental trial rights. *See*, *e.g.*, Francis A. Allen, "A Serendipitous Trek Through the Advance-Sheet Jungle: Crimi-

of bias cross-examination as per se error is a reasonable response in view of the utter arbitrariness of the trial judge.

Inasmuch as there is no federal jurisdiction for the United States Supreme Court to review this matter, the writ of certiorari must be dismissed as improvidently granted.

## III. UNDER THE FACTS OF THIS CASE REVERSAL OF THE CONVICTIONS OF VAN ARSDALL IS REQUIRED SINCE THE STATE HAS NOT MET ITS BURDEN OF ESTABLISHING BEYOND A REASONABLE DOUBT THAT THE CONSTITUTIONAL CONFRONTATION DEPRIVATION DID NOT CONTRIBUTE TO THE GUILTY VERDICTS.

Van Arsdall has previously asserted (Argument I above) that Fleetwood was an essential prosecution witness since Van Arsdall never conceded that his presence in Pregent's apartment was known to Fleetwood. The defense centered on the uncontroverted fact that after the murder Van Arsdall walked across the hall to Fleetwood's apartment carrying the murder weapon, knocked on the door and told the occupants of that apartment that something was wrong across the hall. The defense argued that this behavior was so inconsistent with that of a murderer it raised a reasonable doubt of guilt. Since no one, other than Van Arsdall, testified as to what happened in Pregent's apartment during the murder, this post-homicide conduct was an important basis on which the jury could judge his innocence.

Fleetwood was the one and only witness whose testimony the State used to argue that this behavior was not indicative of Van Arsdall's innocence. It was the only explanation offered by the State that his behavior in crossing the hall was consistent

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nal Justice in the Courts of Review." 70 Iowa L. Rev. 311 (1985); Thomas Y. Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal," 1982 Am. B. Found. Research J. 543 (1982); and R. Traynor, *The Riddle of Harmless Error* (1970).



with guilt, and as that behavior was the lynchpin of the defense, Fleetwood's testimony became crucial to the State. Only by exposing Fleetwood's bias could Van Arsdall counter the probative effect of Fleetwood's testimony.

Petitioner has not sustained its burden of proving beyond a reasonable doubt that the concededly erroneous restriction on bias cross-examination did not contribute to the verdict. *Chapman* v. *California*, *supra*, 24. These facts do not permit a finding that this confrontation denial was harmless error.

## IV. A CRIMINAL DEFENDANT DOES NOT BEAR THE BURDEN OF PROVING THAT A DENIAL OF THE RIGHT OF CONFRONTATION ACTUALLY AND MATERIALLY PREJUDICED HIS DEFENSE.

Amicus is attempting to stand this Court's 1967 decision in *Chapman* v. *California*, *supra*, 24, on its head, by arguing that a defendant, not the beneficiary of a constitutional error (in this case the prosecution), is required to establish that the erroneous restriction "actually and materially prejudiced his defense."[50]

Amicus cites no authority and presents no policy justification for its attempt to shift the burden of proof to the defendant contrary to the plain language in *Chapman* v. *California*, *supra*, 24. In a complete reversal of *Chapman*, Amicus complains that the Delaware Supreme Court before finding any violation of the Confrontation Clause should have required Van Arsdall ". . . to demonstrate that the restriction actually and materially prejudiced his defense." The short answer is that no such requirement exists for this category of constitutional deprivation.[51]

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[50] Brief of Amicus at page 17. See also discussion at page 9 and page 17 footnote 21 of Brief of Amicus.

[51] This situation is also distinguishable from the requirement that a defendant complaining of ineffective assistance of counsel at least specify how his trial counsel was ineffective. *See Strickland* v. *Washington*, *supra;* and *United States* v. *Hasting*, *supra*.

There is no sound policy reason for now reversing the requirement of *Chapman* by shifting the burden to a defendant as the non-beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did contribute to the guilty verdict.[52] It is an insidious postulation to think that a prosecutor may deprive an accused of constitutional protections with impunity unless the *defendant* can demonstrate that such error was not harmless.

## CONCLUSION

The judgment of the Delaware Supreme Court should be affirmed. In the alternative, this writ of certiorari should be dismissed as improvidently granted for lack of federal jurisdiction.

Respectfully submitted,

PRICKETT, JONES, ELLIOTT,
KRISTOL & SCHNEE
BY: JOHN WILLIAMS
26 The Green
Dover, Delaware 19901
(302) 674-3841

WILLIAM N. NICHOLAS
4 The Green
Dover, Delaware 19901
(302) 674-4480
*Counsel for Respondent*

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[52] Any alleged source of basic principles of modern American law (Amicus Brief p. 9) is a mystery to Van Arsdall.